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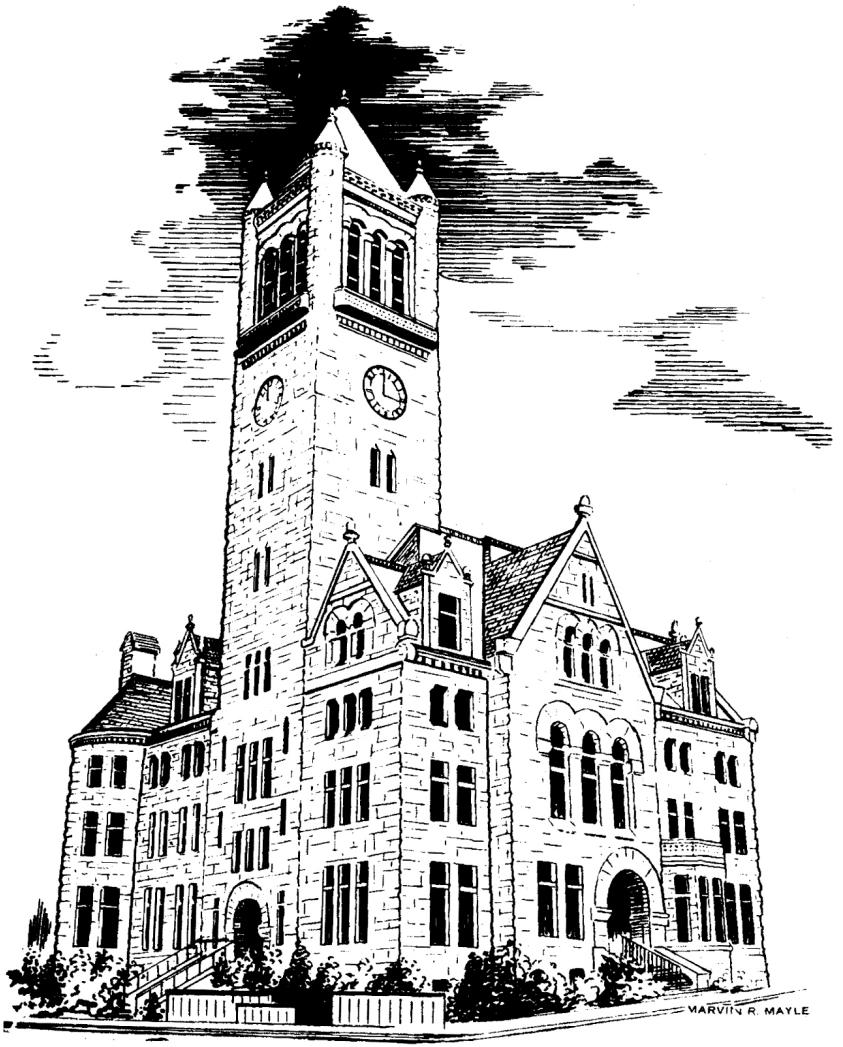

FAYETTE LEGAL JOURNAL

The FAYETTE LEGAL JOURNAL is published weekly by the Fayette County Bar Association, 2 West Main Street, Suite 711, Uniontown, Pennsylvania 15401, 724-437-7994. Legal advertisements should be submitted online at www.fcbar.org no later than 12:00 noon on Friday for publication the following Saturday. No date of publication is promised, however. Legal notices are published exactly as submitted by the advertiser.

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Notice is hereby given that letters testamentary or of administration have been granted to the following estates. All persons indebted to said estates are required to make payment, and those having claims or demands to present the same without delay to the administrators or executors named.

Third Publication

ERNEST D. ARNOLD, a/k/a ERNEST ARNOLD, late of Perryopolis Borough, Fayette County, PA (3)
Executor: Daniel J. Arnold
c/o Zebley Mehalov & White, P.C.
18 Mill Street Square
P.O. Box 2123
Uniontown, PA 15401
Attorney: Daniel R. White

ROSE A. KODRIC, late of South Union Township, Fayette County, PA (3)
Executor: Steve A. Andrasy
c/o 4 North Beeson Boulevard
Uniontown, Pa 15401
Attorney: Sheryl R. Heid

BLANCHE DASCANI, a/k/a BLANCHE W. DASCANI, late of Bullskin Township, Fayette County, PA (3)
Executor: Paul Dascani
P.O. Box 805
Connellsville, PA 15425
c/o 4312 Old William Penn Highway
Murrysville, PA 15668
Attorney: Thomas Earhart

Second Publication

DENNIS JAMES CHIPPS, late of Smithfield, Fayette County, PA (2)
Administrator: James Lee Chipps
c/o 2944 National Pike Road
Box 245
Chalk Hill, PA 15421
Attorney: Charles C. Gentile

JOSEPH DUPPE, a/k/a JOSEPH F. DUPPE, late of Menallen Township, Fayette County, PA
Personal Representatives: (2)
Katherine M. Feaganes and Andrew P. Duppe
c/o Higinbotham Law Office
45 East Main Street, Suite 500
Uniontown, PA 15401
Attorney: James E. Higinbotham, Jr.

OTTO C. STRINER, a/k/a OTTO C. STRINER, JR., late of Upper Tyrone Township, Fayette County, PA (2)
Personal Representatives:
David Striner and Helen Gilpin
c/o Watson Mundorff Brooks & Sepic
720 Vanderbilt Road
Connellsville, PA 15425
Attorney: Charles W. Watson

First Publication

KENNETH LEE BELL, a/k/a KENNETH L. BELL, late of Washington Township, Fayette County, PA (1)
Executrix: Jennifer Lee Metikosh
254 Chickee Lane
Belle Vernon, PA 15012
c/o Shire Law Firm
1711 Grand Boulevard
Park Centre
Monessen, PA 15062
Attorney: Bernard S. Shire

LORA A. HAUGER, a/k/a LORI A. HAUGER, late of South Union Township, Fayette County, PA (1)
Administrator: James Gregory Hauger
c/o Nakles and Nakles
1714 Lincoln Avenue
Latrobe, PA 15650
Attorney: Ned J. Nakles, Jr.

JAMES M. HODDO, late of Redstone Township, Fayette County, PA (1)
Executor: Anthony Dominick
c/o 51 East South Street
Uniontown, PA 15401
Attorney: Anthony S. Dedola, Jr.

ROBERT MARKUTSA, a/k/a ROBERT EUGENE MARKUTSA, late of Fairchance, Fayette County, PA (1)
Executor: Francis Markutsa
4 Jeffrey Lane
Fairchance, PA 15436
c/o Bootay, Bevington & Nichols, LLC
6 Clairton Boulevard
Pittsburgh, PA 15236
Attorney: Travis J. Dunn

KATHRYN A. MENNI, late of Uniontown, Fayette County, PA (1)
Personal Representative: Barbara M. Juriga
c/o Davis & Davis
107 East Main Street
Uniontown, PA 15401
Attorney: Gary J. Frankhouser

MARY CATHERINE CAMPBELL SPEGAR, a/k/a MARY C. CAMPBELL SPEGAR, late of Chalk Hill, Fayette County, PA (1)
Administrator: Michael J. Spegar, III
465 Mountain Road
Uniontown, PA 15401
c/o Bassi, Vreeland & Associates, P.C.
62 East Wheeling Street
Washington, PA 15301-4804
Attorney: Thomas O. Vreeland

LEGAL NOTICES

IN THE COURT OF COMMON PLEAS OF
FAYETTE COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW
NO. 21 of 2018, G.D.

IN RE: NAME CHANGE OF YELENA RENEE GRIFFITH, a minor,
By her parent and natural guardian,
AMY L. FORD,
Petitioner.

NOTICE

Notice is hereby given that on January 8, 2018, the Petition of Yelena Renee Griffith, a minor, by her parent and natural guardian, Amy L. Ford, was filed with the above named Court, requesting an order of Court to change the name of Yelena Renee Griffith to Yelena Renee Ford.

The Court has fixed the day of 14th day of March, 2018, at 10:00 A. M. in Court Room Number 2 of the Fayette County Court House, Uniontown, Pennsylvania, as the time and place for the hearing on said Petition, when and where all interested parties may appear and show cause, if any, why the request of the petitioner should not be granted.

Watson Mundorff Brooks & Sepic, LLP
720 Vanderbilt Road
Connellsville, PA 15425-6218

IN THE COURT OF COMMON PLEAS OF
FAYETTE COUNTY PENNSYLVANIA
CIVIL DIVISION
NO.: 1 OF 2018 GD

DOLLAR BANK, FEDERAL SAVINGS BANK,
Plaintiff,
vs.
GREGORY LYONS, HEIR OF THE ESTATE OF NANCY E. LYONS, AND KELLY HARVEY, HEIR OF THE ESTATE OF NANCY E. LYONS, AND JOSEPH OLSZEWSKI, HEIR OF THE ESTATE OF NANCY E. LYONS, AND DANIELLE OLSZEWSKI, HEIR OF THE ESTATE OF NANCY E. LYONS, AND THE UNKNOWN HEIRS OF THE ESTATE OF NANCY E. LYONS,
Defendants.

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If you wish to defend, you must enter a written appearance personally or by attorney and file your defenses or objections in writing with the court. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you without further notice for the relief requested by the plaintiff. You may lose money or property or other rights important to you.

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JUDICIAL OPINION

IN THE COURT OF COMMON PLEAS OF FAYETTE COUNTY, PENNSYLVANIA
CIVIL DIVISION

PAUL E. BARKFELT, III, and	:	
DOMINIQUE BARKFELT,	:	
Plaintiffs,	:	
vs.	:	
	:	
FRANKLIN TOWNSHIP, S.R. SMITH, LLC,	:	
i/t/d/b/a S.R. SMITH, and STONERIDGE, INC.,	:	
Defendants.	:	No. 2473 of 2014, G.D.

OPINION IN SUPPORT OF ORDER

SOLOMON, SJ January 24, 2018

Before the Court are three Motions for Summary Judgment filed individually by all Defendants, Franklin Township, S.R. Smith, LLC, and Stoneridge, Inc.

STANDARD OF REVIEW

The standards for ruling on a motion for summary judgment are well-defined and clear. The court can grant summary judgment only in those cases where the record clearly demonstrates that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. When considering a motion for summary judgment, the trial court must take all facts of record, and reasonable inferences therefrom, in the light most favorable to the non-moving party. In doing so, the trial court must resolve all doubts as to the existence of a genuine issue of material fact against the moving party and, thus, may only grant summary judgment where the right to such judgment is clear and free from all doubt. See Summers v. Certainteed Corporation, 997 A.2d 1152 (Pa. 2010); Toy v. Metropolitan Life Insurance Company, 593 Pa. 20, 928 A.2d 186 (2007).

DISCUSSION

On July 1, 2011, at the Franklin Township Community Pool, Paul E. Barkfelt, III, Plaintiff, jumped on the diving board to the pool when the board compressed and struck him in the soles of his feet causing injury. The pool was owned by Defendant Franklin Township, and work was contracted in 2009 to Defendant Stoneridge, Inc., to furnish components of the swimming pool, which included a diving board that was designed, manufactured, and/or sold by Defendant S.R. Smith. We will now address each motion.

Franklin Township

In its Motion, Franklin Township moves for Summary Judgment asserting governmental immunity and, alternatively, that it provided warning signs of the weight limitation.

With regard to governmental immunity, except as otherwise provided, no local agency

shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency, any employee thereof, or any other person. 42 Pa.C.S. §8541. Exceptions to governmental immunity are created by statute. 42 Pa.C.S.A. §8542. The expressed legislative intent in the Political Subdivision Tort Claims Act is to insulate the Commonwealth and its political subdivisions from liability and requires courts to interpret the exceptions to governmental immunity narrowly against injured plaintiffs. Moles v. Borough of Norristown, 780 A.2d 787 (Pa.Cmwlth. 2001).

Instantly, Plaintiffs allege that the diving board constituted a dangerous condition of real property such that an exception to governmental immunity would apply. The real property exception to governmental immunity as set forth in Section 8542(b)(3) provides:

> (b) Acts which may impose liability. The following acts by a local agency or any of its employees may result in the imposition of liability on a local agency:
> ...
> (3) Real property.--The care, custody or control of real property in the possession of the local agency, except that the local agency shall not be liable for damages on account of any injury sustained by a person intentionally trespassing on real property in the possession of the local agency. As used in this paragraph, "real property" shall not include:
> (i) trees, traffic signs, lights and other traffic controls, street lights and street lighting systems;
> (ii) facilities of steam, sewer, water, gas and electric systems owned by the local agency and located within rights-of-way;
> (iii) streets; or
> (iv) sidewalks.

42 Pa.C.S.A. § 8542(b)(3).

Our Supreme Court found that:

> Chattels used in connection with real estate are of three classes: First, those which are manifestly furniture, as distinguished from improvements, and not peculiarly fitted to the property with which they are used; these always remain personalty.... Second, those which are so annexed to the property that they cannot be removed without material injury to the real estate or to themselves; these are realty, even in the face of an expressed intention that they should be considered personalty.... Third, those which, although physically connected with the real estate, are so affixed as to be removable without destroying or materially injuring the chattels themselves, or the property to which they are annexed; these become part of the realty or remain personalty, depending upon the intention of the parties at the time of the annexation; in this class fall such chattels as boilers and machinery affixed for the use of an owner or tenant but readily removable....

Clayton v. Lienhard, 167 A. 321, 322 (Pa. 1933) (citations omitted).

The Commonwealth Court of Pennsylvania has previously analyzed whether a diving board is considered personalty in County of Allegheny v. Fedunok, 642 A.2d 595 (Pa. Commw. 1994), a case factually similar to the instant case:

> The undisputed facts in the instant matter are that the diving board at issue is attached to the swimming pool by two bolts and that it can be removed without being destroyed or materially injured, that the diving board is removed during swim meets and after each

> swimming season, for a period from shortly after Labor Day until shortly before Memorial Day. We hold, as a matter of law, based on these undisputed facts, that the diving board is personalty and that the real property exception to governmental immunity does not apply. The County, therefore, is entitled to entry of summary judgment.

County of Allegheny v. Fedunok, 642 A.2d at 597.

Plaintiffs attempt to distinguish Fedunok on the basis that the date of the decision was prior to the Pennsylvania Supreme Court's abolition of the obligation of a plaintiff to prove whether a defect was "of" or "on" the land. Such distinction does not materially differ the ultimate conclusion that the diving board is the type of chattel that "although physically connected with the real estate, are so affixed as to be removable without destroying or materially injuring the chattels themselves, or the property to which they are annexed; these become part of the realty or remain personalty." Clayton v. Lienhard, supra. The factual basis and legal analysis of the Fedunok decision is not altered by Plaintiffs' argument that the decision is dated prior to the abolition of proving whether a defect was "of" or "on" the land. Accordingly, we so hold that installation of the diving board with bolts, the use of the diving board as affixed to the pool with the ability to be removed, and the manner it was used, including its actual removal seasonally, establishes the diving board to be personalty. As such, the real property exception of governmental immunity cannot be met and the Motion of Franklin Township for Summary Judgment must be granted.

S.R. Smith, LLC

Plaintiff instituted a product liability action against S.R. Smith and asserts that S.R. Smith is at fault for failing to warn or instruct that the diving board had a 250 pound weight limit. Plaintiff admits to weighing approximately 300 pounds at the time of the accident. Herein, Plaintiffs maintain that S.R. Smith failed to properly or adequately warn or instruct in the proper use of the diving board when it sold the board "without a permanently affixed label to the diving equipment which included the maximum weight of the diver." See, Complaint ¶33. S.R. Smith denies the allegation and asserts that as designed, manufactured, and supplied, the diving board was equipped with every element necessary to make it safe and that it contained no element making it unsafe.

S.R. Smith further asserts that Plaintiff's liability theory fails as there exists no evidence that S.R. Smith had a duty to warn, failed to warn, or instruct, or that any alleged failure to warn or instruct caused Plaintiffs' accident, injuries, or damages.

S.R. Smith also alleges it had attached a warning/instruction label/placard on the diving board which described proper and safe application, operation and use of the board in the packaging materials. The label, according to S.R. Smith, was attached to the end of the board where the user would step onto the board and instructed "Weight limit 250 lbs. One person at a time." The box and instructions also included the weight limit. Further, Franklin Township published "Diving Board Rules" which directed "1. Max weight limit 250 lbs." and "8. Do not bounce at the end of the diving board. You have one bounce to jump into the water."

In their Complaint, Plaintiffs allege the diving equipment was defective because "it failed to have adequate and proper permanently affixed visible warnings of the maximum weight limitations," the markings "were not permanently affixed and/or were located where they were not clearly visible," and the board "lacked proper and conspicuous labels and

warnings and did not contain all accouterments necessary to it (sic) safe for use." See, Complaint ¶27-29. Plaintiff, in response to this Motion, also contests that the labels submitted by S.R. Smith as the warning labels were actually the labels on the side of the board. Plaintiff also contests the visibility of the warning label on the end of the board alleging that it was shadowed and obscured to an approaching user.

For the purpose of evaluating the legal sufficiency of the challenged pleading, this Court must accept as true all well-pled, material, and relevant facts alleged in the complaint and every inference that is fairly deducible from those facts. Leach v. Turzai, et al., 118 A.3d 1271, 1277 (Pa.Cmwlth. 2015). Accepting as true the allegations of Plaintiffs' Complaint, an issue of fact remains for determination by the fact finder as to whether or not the label was adequate, permanently affixed, visible, and included all necessary "accouterments."

S.R. Smith also moves for judgment arguing that the alleged failure to warn did not cause the accident because Plaintiff "would have acted no differently had different or other warning/instructions" been provided. In order to establish causation for failure to warn, it must be demonstrated that the user of the product would have avoided the risk had he been warned of it by the seller/manufacturer. Phillips v. A-Best Products, Co., 665 A.2d 1167, 1170 (Pa.1995).

The basis for this argument would require the Court to speculate as to the possible actions or inactions of Plaintiff based on hypothetical additional or different warning labels. The Court will not guess what Plaintiff would have done as the same would require a determination by the trier of fact.

S.R. Smith lastly requests summary judgment since Plaintiffs cannot establish that any alleged failure to warn existed and/or caused Plaintiffs' accident, injuries and/or damages by qualified and competent expert testimony.

> Pennsylvania Rule of Evidence 702 provides:
> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson;
> (b) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; and
> (c) the expert's methodology is generally accepted in the relevant field.

Generally, expert testimony is permitted as an aid to the jury when the subject matter of the testimony is so distinctly related to some science, skill, or occupation as to be beyond the knowledge or experience of the average layman. Beary v. Container General Corp., 533 A.2d 716, 722 (Pa.Super. 1987).

> If all the primary facts can be accurately described to a jury and if the jury is as capable of comprehending and understanding such facts and drawing correct conclusions from them as are witnesses possessed of special training, experience or observation, then there is no need for the testimony of an expert. […] The employment of testimony of an expert rises from necessity, a necessity born of the fact that the subject matter of the inquiry is one involving special skills and training beyond the ken of the ordinary layman.

Reardon v. Meehan, 227 A.2d 667(Pa. 1967) (internal citations omitted).

Here, an expert may possess "scientific, technical, or other specialized knowledge" on the ultimate issues that could aid Plaintiffs in meeting their burden to a trier of fact, but such expert testimony is not required.

In its Memorandum, S.R. Smith argues "claims of failure to warn require the identification of a specific defect of a particular product which is beyond the skill and training of an ordinary layman and, therefore, must be established by expert testimony" and, in support, cites Weiner v. Am. Honda Motors Co., 718 A.2d 305, 309 (Pa. Super. 1998)(citing Dambacher v. Mallis, 485 A.2d 408, 426 (Pa. Super. 1984), and Dion v. Graduate Hosp. of the Univ. of Pa., 520 A.2d 876 (Pa. Super. 1987), for the proposition that expert testimony is required to determine if a manufacturer's warning is adequate. The Court found these cases instructive:

> The claim of "failure to warn" is a subset of defective design in which "a 'defect' is supposed to exist because the user was not adequately instructed on how to use the product as the product was designed." Dambacher, 485 A.2d at 426. To succeed on a claim of inadequate or lack of warning, a plaintiff must prove that the lack of warning rendered the product unreasonably dangerous and that it was the proximate cause of the injury. O'Neill v. Checker Motors Corp., 389 Pa.Super. 430, 567 A.2d 680, 682 (1989). Failure to establish either of these two elements bars plaintiff's recovery as a matter of law.

Weiner, 718 A.2d at 309.

> Frequently, the jury, or the court trying a case without a jury, is confronted with issues which require scientific or specialized knowledge or experience in order to be properly understood. Certain questions cannot be determined intelligently merely from the deductions made and inferences drawn from practical experience and common sense. On such issues, the testimony of one possessing special knowledge or skill is required in order to arrive at an intelligent conclusion. 31 Am.Jur.2d Expert and Opinion Evidence § 16 (1967). In these matters, where laymen have no knowledge or training, the court and jury are dependent on the explanations and opinions of experts.
>
> In a logical and fundamental sense, a verdict is worth only as much as the evidence upon which it is based. In a complex case, a jury, in order to reach an intelligent conclusion, is dependent on expert testimony. If the jury is enlightened, it will reach the right verdict. Unaided by the explanations and opinions of those with specialized knowledge or skill, the ultimate conclusion might just as well be based on evidence presented in a language unfamiliar to the jury. Unless the jury is comprised of experts in the field, the verdict is based on mere conjecture. Such a verdict is worthless.

Dion, 520 A.2d at 425.

We note significant factual differences to distinguish Plaintiffs' current claim from the above line of cases. The Court in Dion was presented with a failure to warn claim in relation to a prescription drug. The Superior Court wrote:

> Prescription drugs are likely to be complex medicines, esoteric in formula and varied in effect. The terms and applications of a warning on such a drug, in order to have meaning, must be explained to the jury. This is a subject "so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman." McCormick on Evidence 33 (E. Cleary, 3d ed. 1984). Thus, we hold that

> in a complex products liability action such as this, expert testimony is required to determine whether the drug manufacturer's warning to the medical community is adequate.

Dion, 520 A.2d at 425-426.

In its opinion, the Superior Court cautioned that its holding "is limited to those cases in which the meaning of the warning eludes the comprehension of an ordinary layperson. Where any layperson can understand the insufficiency of a warning, expert testimony is not necessary. It is for the trial court to limit this requirement to the bounds of necessity." Id. at 426.

Here, the subject of warning labels on a diving board are not so distinctively related to science as to be beyond the common sense knowledge of the average layman. Therefore, we are of the opinion that expert testimony on this issue is not a necessity. Wherefore, the Motions of S. R. Smith for Summary Judgment must be denied.

Stoneridge, Inc.

Defendant Stoneridge, Inc., filed its second Motion for Summary Judgment and, therein, incorporated the Motion for Summary Judgment of Defendant S.R. Smith and Brief in support thereof and requested judgment for the same reasons as set forth in the Motion of S.R. Smith. Since we denied the Motion of S.R. Smith, the second Motion for Summary Judgment filed by Stoneridge, Inc. must also be denied.

WHEREFORE, we will enter the following Order.

ORDER

AND NOW, this 24th day of January, 2018, upon consideration of the Motion for Summary Judgment filed by Defendant, Franklin Township, it is hereby ORDERED and DECREED that the Motion is GRANTED and the claims against Franklin Township are DISMISSED.

It is further ORDERED and DECREED that the Motion for Summary Judgment filed by S.R. Smith, LLC, and the second Motion for Summary Judgment filed by Stoneridge, Inc., are DENIED.

BY THE COURT,
GERALD R. SOLOMON,
SENIOR JUDGE

ATTEST:
Prothonotary